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No. 05-5992

IN THE SUPREME COURT OF THE UNITED STATES

JACOB ZEDNER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioner's waiver of his rights under the Speedy Trial Act bars him from challenging delay resulting from a continuance that petitioner requested and the Act authorizes.

2. Whether the district court committed reversible error by not beginning petitioner's trial at a time when petitioner could not have been tried because of his incompetency to stand trial and his attorney's unavailability.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A2-A30) is reported at 401 F.3d 36.

JURISDICTION

The judgment of the court of appeals was entered on March 8, 2005. A petition for rehearing was denied on May 24, 2005. The petition for a writ of certiorari was filed on August 22, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of New York, petitioner was convicted on six

counts of attempting to defraud a financial institution, in violation of 18 U.S.C. 1344. He was sentenced to 63 months of imprisonment. The court of appeals affirmed petitioner's convictions, but vacated the sentence and remanded for resentencing.

1. The Speedy Trial Act

The Speedy Trial Act (STA), 18 U.S.C. 3161, et. seq., requires a defendant's trial to begin within 70 days of his indictment or appearance before a judicial officer, whichever occurs later. 18 U.S.C. 3161(c)(1). Excluded from the computation of the 70 days are periods of delay resulting from: the defendant's mental incompetence or physical inability to stand trial, 18 U.S.C. 3161(h)(4); proceedings, including examinations, to determine the mental competency or physical capacity of the defendant, 18 U.S.C. 3161(h)(1)(A); interlocutory appeals, 18 U.S.C. 3161(h)(1)(E); the prompt disposition of pretrial motions, 18 U.S.C. 3161(h)(1)(F); and various other matters, 18 U.S.C. 3161(h). In addition, any "period of delay resulting from a continuance granted by any judge on his own motion or at the request of the defendant or his counsel or at the request of the attorney for the Government" is excludable "if the judge granted such continuance on the basis of his findings that the ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial," and the court "sets forth, in the record of the case, either orally

or in writing, its reasons for [that] finding." 18 U.S.C. 3161(h)(8)(A).

If the defendant is not brought to trial within the 70-day period, "the information or indictment shall be dismissed on motion of the defendant." 18 U.S.C. 3162(a)(2). Dismissal may be with or without prejudice, depending upon the district court's weighing of various factors. Ibid.; United States v. Taylor, 487 U.S. 326, 336-337, 342-343 (1988). "Failure of the defendant to move for dismissal prior to trial or entry of a plea of guilty or nolo contendere shall constitute a waiver of the right to dismissal." 18 U.S.C. 3162(a)(2).

2. District Court Proceedings

In March 1996, petitioner attempted to open accounts at several financial institutions with a counterfeit $10 million bond. The bond contained obvious mistakes. One of the institutions called the Secret Service, which arrested petitioner and seized three additional counterfeit bonds from him, each in the amount of $10 million. Pet. App. A3-A4.

On April 6, 1996, petitioner was indicted. The district court excluded the time between June 7, 1996, and November 8, 1996, from the STA's 70-day period because of failures of petitioner's counsel to appear and the complexity of the case. On November 8, 1996, petitioner requested a continuance through the end of January 1997. The court informed petitioner that because it had lengthy trials

pending and was concerned that petitioner would invoke his speedy trial rights in the interim, it would grant the continuance only if petitioner executed a "waiver for all time" of his speedy trial rights. Pet. App. A4-A5. Petitioner agreed orally and signed a written waiver. His counsel further assured the court, "We'[ll] waive for all time. That will not be a problem. That will not be an issue in this case." Id. at A11. The court adjourned the proceedings until January 31, 1997, and issued no further orders of exclusion from the STA's 70-day period for the duration of the case. Id. at A5.

On January 31, 1997, the government announced that it was ready for trial, but petitioner's counsel requested a continuance until May 5, 1997, which was granted. Petitioner's counsel later requested to be relieved from duty because petitioner wanted to assert a frivolous defense at trial, and petitioner submitted to a psychiatric examination at the court's request. In August 1997, petitioner was judged competent to stand trial. Pet. App. A5, A15.

In September 1997, petitioner discharged his attorney and represented himself. Petitioner then filed numerous motions and subpoenas directed at high-ranking government officials, which caused the court to question petitioner's competency. On October 14, 1997, the day the trial was scheduled to begin, the court found that petitioner was not competent to stand trial and ordered him committed for hospitalization and treatment pursuant to 18 U.S.C.

4241(d). Petitioner took an interlocutory appeal, and the Second Circuit reversed and remanded for a new competency hearing. United States v. Zedner, 193 F.3d 562 (2d Cir. 1999). Pet. App. A6.

At a status conference on April 27, 2000, the government and petitioner moved that a competency hearing be held on July 10, 2000. A hearing was held on that date. Afterwards, the court asked for further briefs, which the parties filed in August 2000. Pet. App. A7.

On March 7, 2001, petitioner moved to dismiss the indictment on statutory and constitutional speedy trial grounds. The court denied that motion on the grounds that the case was complex and that petitioner had waived his speedy trial rights. Pet. App. A7-A8. The district court also found petitioner incompetent to stand trial, and the Second Circuit affirmed that determination. United States v. Zedner, 29 Fed. Appx. 711 (2d Cir. 2002). From May until August 2002, petitioner was confined in a federal medical facility for examination. The facility report concluded that petitioner was delusional but competent to stand trial. Pet. App. A7-A8.

The district court accepted that report, and began trial on April 7, 2003. The jury convicted petitioner on six counts of attempting to defraud a financial institution, in violation of 18 U.S.C. 1344. He was sentenced to 63 months of imprisonment. Pet. App. A8-A9.

3. The Court of Appeals' Decision

The court of appeals affirmed the convictions, but vacated the sentence and remanded for resentencing because the district court may have misunderstood its authority to depart from the Sentencing Guidelines and its discretion pursuant to United States v. Booker, 125 S. Ct. 738 (2005). Pet. App. A2-A29. Petitioner argued, among other things, that he was denied his right to a speedy trial under the STA based on two periods of delay: January 31 to May 2, 1997; and August 11, 2000, until March 7, 2001.

a. The court of appeals held that petitioner waived his objection to the first of the disputed periods, during which time the trial was postponed at petitioner's request. Pet. App. A12-A15. After recognizing that defendants may not routinely waive their speedy trial rights, id. at A12, the court held that "when a defendant requests an adjournment that would serve the ends of justice, that defendant will not be heard to claim that her Speedy Trial rights were violated by the court's grant of her request," id. at A15.

The court of appeals noted that after petitioner waived his speedy trial rights, the district court "did not enter any orders of exclusion" from the STA's 70-day period "based on its assumption that the waiver 'for all time' removed all speedy trial issues from the case." Pet. App. A11; see id. at A4. The court concluded that "there can be no doubt that the district court could have properly

excluded [the relevant] period of time based on the ends of justice" because of "the complexity of the case and [petitioner's] reasonable need for additional preparations." Id. at A15. Thus, the court held, petitioner "cannot establish a Speedy Trial Act violation based on the grant of the delay he requested." Ibid.

The court of appeals emphasized, however, that "district courts contemplating adjournment of trial are far better advised to make prospective 'ends of justice' findings under § 3161(h)(8), where appropriate, rather than to rely on defendant waivers. Reliance on waivers 'for all time' seems particularly inadvisable." Pet. App. A15-A16 n.3.

b. The court of appeals held that the second period of challenged delay, from August 2000 until March 2001, did not violate the STA because petitioner "could not have been tried in this period, for two reasons": his counsel was "unavailable for trial due to complications resulting from her pregnancy," and petitioner "was not competent to stand trial." Pet. App. A16.

With respect to the second of those reasons, the court explained that the district court found petitioner to be incompetent and the court of appeals affirmed that decision. Pet. App. A16. The STA excludes "[a]ny period of delay resulting from the fact that the defendant is mentally incompetent or physically unable to stand trial." 18 U.S.C. 3161(h)(4). The court of appeals noted that "[i]t might be argued" that "the delay did not

result from the fact that [petitioner] was incompetent" to stand trial because the district court did not make findings to that effect. Pet. App. A17. But it concluded that "[t]he failure to start trial when [petitioner] could not have been tried was, at worst, a harmless, technical error." Ibid. The court recognized that many STA violations are not harmless, but concluded that "failure to consider the harmlessness of certain errors under the [STA] can result in perverse outcomes" and would be inconsistent with 28 U.S.C. 2111 and Federal Rule of Criminal Procedure 52(a), both of which instruct appellate courts to disregard errors that do not affect substantial rights. Pet. App. A18-A19.

ARGUMENT

1. Petitioner contends (Pet. 10-25) that the court of appeals erred by enforcing his wavier of speedy trial rights with respect to a three-month continuance that petitioner requested. That contention does not warrant further review.

a. Criminal defendants may waive their most fundamental constitutional and statutory rights. New York v. Hill, 528 U.S. 110, 114 (2000); United States v. Mezzanatto, 513 U.S. 196, 200-201 (1995); Peretz v. United States, 501 U.S. 923, 936 (1991). Statutory rights are presumptively waivable. Hill, 528 U.S. at 116; Mezzanato, 513 U.S. at 201. Thus, waiver of a statutory right is permissible unless Congress has affirmatively indicated an intent to preclude waiver, ibid., such as when the right at issue

is "so central to the [statute] that it is part of the unalterable 'statutory policy.'" Hill, 528 U.S. at 117.

In Hill, this Court held that defendants may waive their rights to trials within the time limits of the Interstate Agreement on Detainers Act (IAD) by agreeing to trial dates outside of those limits. 528 U.S. at 118. The Court recognized that the IAD authorizes "good cause continuances" in some circumstances, but concluded that such authorization does not, by negative implication, "constitute the 'affirmative indication' required to overcome the ordinary presumption that waiver is available." Id. at 116 (quoting Mazzenatto, 513 U.S. at 201). The Court also recognized that the IAD's time limits may benefit society as well as defendants, but explained that "[w]e allow waiver of numerous constitutional protections for criminal defendants that also serve broader social interests." Id. at 117; see ibid. ("[I]n an adversary system of criminal justice, the public interest in the administration of justice is protected by the participants in the litigation.") (quoting Gannett Co. v. DePasquale, 443 U.S. 368, 383 (1979)). In a footnote, the Court noted that the IAD and the STA differ in some respects, but it "express[ed] no view" on the waivability of the STA's time limits. Id. at 117 n.2.

b. In this case, the court of appeals followed circuit precedent "join[ing] with every circuit that has addressed the issue in finding that defendants generally may not elect to waive

the protections of the [STA]." United States v. Gambino, 59 F.3d 353, 359-360 (2d Cir. 1995), cert. denied, 517 U.S. 1187 (1996); Pet. App. A12. It reasoned that the public interest in expeditious prosecution of criminal cases "would be undermined if the provisions of the Act intended for public benefit could be routinely nullified by a defendant's waiver." Id. at A12.

The court recognized a narrow exception, however, for situations in which the defendant requests a continuance that would be excludable from the 70-day STA period on the ground that "the ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial." 18 U.S.C. 3161(h)(8)(A); see Pet. App. A15. In such circumstances, an STA violation could arise, if at all, only because of the district court's failure to make an "ends of justice" finding in the record. As the court of appeals emphasized, the reason the district court did not make such a finding with respect to the challenged period in this case is that petitioner had expressly waived his speedy trial rights and assured the court that there would be no speedy trial issues in the case. Id. at A5, A11.

In that unusual circumstance, enforcing the waiver does not upset congressional policy. The STA expressly permits delay as long as "ends of justice" findings are made on the record. See 18 U.S.C. 3161(h)(8)(A). Holding a defendant to a waiver in the circumstances here merely prevents the defendant from inducing the

district court not to make "ends of justice" findings and then seeking dismissal based on the absence of such findings. This Court has long held that a defendant who invites an error may not then cite that error as a basis for reversal on appeal. See, e.g., Johnson v. United States, 318 U.S. 189, 200-201 (1943). That is precisely what petitioner is attempting to do here.

c. Although the court of appeals acknowledged its disagreement with the Fifth Circuit, see Pet. App. A13-A15 (citing United States v. Willis, 958 F.2d 60 (5th Cir. 1992)), the circuit split is narrower than petitioner suggests. Petitioner contends (Pet. 13-17) that the decision below also conflicts with decisions of the Third, Sixth, Eighth, Ninth, and Tenth Circuits. Those circuits' decisions are distinguishable.

The defendant in United States v. Perez-Reveles, 715 F.2d 1348 (9th Cir. 1983), "was quite adamant that he proceed to trial as soon as possible, [and] that he would not waive any of his time limitations." Id. at 1353. Thus, no waiver issue was raised or discussed in that case. Similarly, in United States v. Ray, 768 F.2d 991 (8th Cir. 1985), the defendant moved to dismiss under the STA at the very beginning of the time period during which he was found not to have validly waived his STA rights. See id. at 993 n.2, 998.

Petitioner correctly acknowledges (Pet. 17) that United States v. Carrasquillo, 667 F.2d 382, 388 (3d Cir. 1981), addressed waiver

only as part of an "alternative holding." Moreover, the defendants in Carrasquillo, as well as in United States v. Pasquale, 25 F.3d 948 (10th Cir. 1994), and United States v. Ramirez-Cortez, 213 F.3d 1149 (9th Cir. 2000), did not expressly waive their STA rights (as did petitioner), and the question in those cases was whether the defendants' mere requests for, or agreements to, later trial dates constituted implicit waivers. See Carrasquillo, 667 F.2d at 388; Pasquale, 25 F.3d at 952; Ramirez-Cortez, 213 F.3d at 1156. Here, in contrast, petitioner made an express waiver of his STA rights that induced the district court not to make "ends of justice" findings it could and presumably would have made but for the express waiver.[1]

For similar reasons, petitioner errs in contending (Pet. 16 n.12) that there is an intra-circuit conflict within the Tenth Circuit. Although that circuit upheld a waiver in United States v. McSwain, 197 F.3d 472 (1999), cert. denied, 529 U.S. 1138 (2000), and rejected one in Pasquale, supra, the circumstances were different. It appears that the defendant in McSwain (like petitioner here) expressly waived his STA rights, see 197 F.3d at 483, while, as explained above, the defendant in Pasquale did not,

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[1] Greenup v. United States, 401 F.3d 758, 764 (6th Cir. 2005) (depublished by order dated June 2, 2005), and United States v. Saltzman, 984 F.2d 1087, 1091 (10th Cir.), cert. denied, 508 U.S. 964 (1993), did not even involve challenges to the timeliness of trials. Instead, they involved challenges to the timeliness of indictments.

see 25 F.3d at 952. In any event, this Court does not sit to resolve intra-circuit conflicts. Wisniewski v. United States, 353 U.S. 901, 902 (1957) (per curiam).

In addition to overstating the extent to which the decision below conflicts with decisions rejecting waivers, petitioner also overstates the extent to which other circuits have approved waivers. Petitioner contends (Pet. 18) that the Eleventh and District of Columbia Circuits have broadly held that all knowing and voluntary waivers of STA rights are enforceable. But in United States v. West, 142 F.3d 1408, 1413 (1998), vacated on other grounds, 526 U.S. 1155 (1999), the Eleventh Circuit upheld an express waiver only after finding, like the court of appeals below, that "the continuance served the 'ends of justice.'" In its earlier decision in United States v. Twitty, 107 F.3d 1482, cert. denied, 522 U.S. 902 (1997), the Eleventh Circuit appears to have determined that the time period covered by the defendant's express waiver was excludable for independent reasons, and the court therefore accepted the waiver only as part of an alternative holding. See id. at 1488 & n.3. Finally, the D.C. Circuit considered only the scope, as opposed to the validity, of an express waiver in United States v. Marshall, 935 F.2d 1298, 1302 (1991), apparently because no validity challenge was raised in that case.

d. The limited disagreement over the appropriateness of

waiver in the circumstances of this case does not warrant this Court's review not only because the decision below is correct, but also because that decision is unlikely to have significant prospective effect. The court of appeals cautioned district courts to make "ends of justice" findings in the future instead of relying on waivers. Pet. App. A15 n.3. District courts can be expected to follow that direction.

Moreover, the Second Circuit's holding is narrow: it applies only when the defendant requests a continuance that would be excludable under the substantive standards of the STA, but the district court fails to make "ends of justice" findings in the record. In those cases where the record is not adequately developed on the "ends of justice" issue -- which might often be the case in the absence of express district court findings -- even an express waiver would be unenforceable under the court of appeals' decision.

2. Petitioner also contends (Pet. 33-40) that the court of appeals erred in applying harmless-error principles to the time period between August 2000 and March 2001. That claim does not warrant further review.

a. The court of appeals' discussion of harmless-error principles was dictum. The court determined that petitioner could not have been tried during the relevant time period for two reasons: the unavailability of his attorney and his incompetence

to stand trial. Pet. App. A16, A19. The court then discussed harmlessness only with respect to the second of those grounds, and only hypothetically. Id. at A17. The court of appeals noted that "[i]t might be argued" that "the delay did not result from the fact that [petitioner] was incompetent" to stand trial because the district court did not make findings to that effect.[2] Pet. App. A17. But the court of appeals did not hold that the district court had in fact erred. Instead, it stated only that "any" error would have been harmless. Id. at A17, A20.

In fact, there was no error. The delay did result in part from petitioner's incompetence to stand trial, because petitioner could not have been tried when he was incompetent. The court of appeals stated that "[t]he argument might be made that the court's failure * * * to make a record that the delay resulted from the defendant's incompetence * * * was at least potentially a technical violation of the Act." Pet. App. A17. But even if that argument were made, it would not be a meritorious one. The STA requires district courts to make "ends of justice" findings for continuances excluded under 18 U.S.C. 3161(h)(8)(A), but it does not require findings for other periods of excludable delay, including periods in which the defendant is incompetent, see 18 U.S.C. 3161(h)(4).

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[2] The STA excludes from the 70-day period "[a]ny period of delay resulting from the fact that the defendant is mentally incompetent or physically unable to stand trial." 18 U.S.C. 3161(h)(4).

Because there was no STA violation based on the August 2000 to March 2001 time period, the question whether any such violation would have been harmless is not properly presented here.

b. In any event, the court of appeals correctly applied harmless-error review to the alleged error. Such review is mandated for errors that do not affect a defendant's substantial rights. See 28 U.S.C. 2111; Fed. R. Crim. P. 52(a); see generally Neder v. United States, 527 U.S. 1, 7 (1999). Although petitioner argues that he should not have to show prejudice from delay (see Pet. 27-28), there was no relevant delay in the unusual circumstances of this case because petitioner could not have been tried during the time period in question, as explained above. Because this case involves at most a "technical" procedural violation that did not result in delay, Pet. App. A17, it does not implicate the distinct question whether substantive violations of the STA that result in delayed trials are subject to harmless-error review.

c. Nor does this case implicate a circuit split on the harmlessness issue. Although petitioner contends (Pet. 28-32) that there is a deep circuit split on the applicability of harmless-error analysis to STA violations, only one of the cited cases, United States v. Carey, 746 F.2d 228 (4th Cir. 1984), cert. denied, 470 U.S. 1029 (1985), considered and rejected the applicability of the "harmless error" doctrine. Because that case held that there

had been no error and that the defendant received a timely trial, id. at 230-231, its consideration of harmless-error principles was dictum. Moreover, none of the cases cited by petitioner as rejecting harmless-error principles involved situations where, as here, there was no delay because the trial could not have begun during the challenged interval. See United States v. Crane, 776 F.2d 600, 604-606 (6th Cir. 1985) (holding that "ends of justice" continuance was not warranted); Perez-Reveles, 715 F.2d at 1352-1353 (same); Carey, 746 F.2d at 230 (same).[3]

Petitioner's reliance (Pet. 33-39) on United States v. Taylor, 487 U.S. 326 (1988), and Alabama v. Bozeman, 533 U.S. 146 (2001), is misplaced for similar reasons. The question in Taylor was whether dismissal under the STA should be with or without prejudice, not whether harmless-error analysis is ever appropriate. See 487 U.S. at 327-328. In Bozeman, Alabama violated Article IV(e) of the IAD by receiving a prisoner from another State for purposes of trying him, but then shuttling the prisoner back-and-forth between Alabama and the other State before the trial began. 533 U.S. at 149. Although this Court held that the violation of the IAD was not amenable to harmless-error analysis, id. at 153,

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[3] The pending petition in Smith v. United States, No. 05-7009 (filed Oct. 13, 2005), presents the question whether harmless-error principles apply to STA violations. In that case (unlike this one), the Seventh Circuit held that the 70-day STA period expired before the beginning of trial, but that the error was harmless. United States v. Smith, 415 F.3d 682, 686 (2005).

the alleged violation of the STA here is far different, in that it involves only the timing of a trial that was not delayed.[4]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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NOVEMBER 2005

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[4] The unusual procedural issue presented here may not recur because of the court of appeals' instruction that district courts should make relevant findings in the future. See Pet. App. A15-A16 n.3. Although petitioner observes that two unreported Second Circuit decisions have cited the decision below, see Pet. 33 n.17 (citing United States v. Goykhman, 142 Fed. Appx. 487 (2005), and United States v. Friemann, 136 Fed. Appx. 396 (2005)), the district courts in those cases did not yet have the benefit of the decision below, and in Goykhman the court of appeals held that there was no error in any event, see 142 Fed. Appx. at 488.

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v.

UNITED STATES AMERICA

CERTIFICATE OF SERVICE

It is hereby certified that all parties required to be served have been served with copies of the **BRIEF FOR THE UNITED STATES IN OPPOSITION** via e-mail and first class mail, postage prepaid, on this 22nd day of November, 2005.

SEE ATTACHED SERVICE LIST

Paul D. Clement/m

PAUL D. CLEMENT
Solicitor General
Counsel of Record

November 22, 2005

Due to the continuing delay in receiving incoming mail at the Department of Justice, in addition to mailing your brief via first-class mail, we would appreciate a fax or email copy of your brief. If that is acceptable to you, please fax your brief to Emily C. Spadoni, Supervisor Case Management, Office of the Solicitor General, at (202) 514-8844, or email at **SupremeCtBriefs@USDOJ.gov**. Ms. Spadoni's direct dial phone number is (202) 514-2217 or 2218. Thank you for your consideration of this request.

05-5992
ZEDNER, JACOB
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No. 04-

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2004

SUPREME COURT, U.S.
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JACOB ZEDNER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

APPLICATION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

TO THE HONORABLE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE UNITED STATES SUPREME COURT.

Petitioner Jacob Zedner respectfully requests leave to proceed here in forma pauperis, without payment of fees and costs. Counsel certifies that, in the court below, counsel was appointed to represent petitioner pursuant to the Criminal Justice Act.

Dated: New York, New York
August 22, 2005

By: _____

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10